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CURRENT TOPICS

The Law Society's Annual Conference

SOME 385 members of The Law Society, together with their guests, assembled in Llandudno this week for the Annual Conference. Opening the Conference on Tuesday morning, the President, Mr. W. CHARLES NORTON, once again drew attention to the importance of an adequately paid and independent legal profession, and he referred in this connection to the representations which had been or were to be made to the Lord Chancellor on costs in civil litigation, including those under the new County Courts Act, and costs in legal aid cases. The profession will be warmly with him in his reiteration of the plea for implementation of the recommendations in the Millard Tucker Report on provisions for retirement. On the difficulties of recruitment of office staff, the President stressed the importance of offering a worthwhile goal and urged solicitors to encourage their clerks to take the examination for managing clerks and to investigate the possibility of providing pensions through the Solicitors' Clerks' Pension Fund. Looking to the future of private practice, he spoke of the inevitable trend towards specialisation amongst solicitors, urging the advantage of partnerships on this score and also suggesting that closer liaison might be advisable with other professional men such as accountants and surveyors. The conclusion may perhaps be drawn from the President's address that no new large issues face the profession at present, although a number of perennial problems remain unsolved. After the opening session the remainder of the conference was held in private.

The Compensation Fund

AT a conference in May this year between the Council of The Law Society and the Presidents and Secretaries of the Provincial Law Societies, held to discuss proposals for the forthcoming Solicitors Bill, it was recommended that a clause be inserted in the Bill to amend s. 2 of the Solicitors Act, 1941, to increase to an amount not exceeding £10 the solicitor's annual contribution to the Compensation Fund. The reasons for this proposal were set out by the then President in his address to the annual general meeting of The Law Society (*ante*, p. 488) and elaborated by him in opening that meeting (*ante*, p. 486). It is clear that in inviting the meeting to adopt the Annual Report the President also expressly invited members to endorse this proposal, and the subsequent adoption of the report might be thought to have amounted to such an endorsement. It is the more surprising, therefore, to find in *The Times* of 27th September a letter from Mr. R. M. TURTON, of Stockton-on-Tees, referring to his original objections in 1939, when the fund was first mooted, and asking all members of the profession who agree with him to write to The Law Society protesting at the proposal to double the contribution. Whatever the merits of his objections —and we confess we find the Council's arguments convincing— there will no doubt be many solicitors who will wonder why they were not raised at the July meeting nor (since Mr. Turton's name is not included in the list of members attending the Annual Conference), apparently, at Llandudno.

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Syndicate Prizes

TRYING out one's forecasting skill and one's luck in a football pool or a Sunday newspaper competition has become so regular a feature of the lives of ordinary people that it may be accounted paradoxical that the law so rarely crosses the path of the most inveterate competitor as such. The background of gentlemen's agreements against which the sport goes on is territory into which the Queen's writ does not run (cf. *Appleson* v. *Littlewood* [1939] 1 All E.R. 464). But it is of course quite wrong to imagine that the courts can never be concerned with matters arising out of such competitions. So long ago as 1910 the *Justice of the Peace* was reporting a decision arising out of a prosecution for frauds in respect of a football forecast (*R.* v. *Booth and Jones*, 74 J.P. 475). Between competitors who send in a joint entry, too, there may arise questions of law if they should happen to be successful. *Hoddinott* v. *Hoddinott* [1949] 2 K.B. 406 arose by way of an application under the Married Women's Property Act, 1882, but the question whether there was a contract between the spouses whose choice of teams had been so happy loomed large in the judgments. In *Simpkins* v. *Pays* [1955] 1 W.L.R. 975; *ante*, p. 563, SELLERS, J., had to consider an arrangement in a sense domestic, but concerning parties other than husband and wife. The lodger, the landlady and the latter's grand-daughter were found to have agreed to go shares in any winnings resulting from their combined entries in a newspaper competition, and it was then contended that even so the contract would not be enforced by the court unless the arrangement was one intended to give rise to legal consequences. His lordship remarked that it might well be that there are many family associations where, in a proper estimate of the circumstances, a rough and ready statement would not be sufficient to establish a contract which was contemplated to have legal consequences. But he thought in the case before him there was a mutuality in the arrangement. It was in the nature of a very informal syndicate so that the parties should all get the benefit of success. The plaintiff recovered judgment for a one-third share of the winnings.

Predicting Recidivism

PREDICTION, once thought the exclusive domain of those claiming supernatural powers, is now, it appears, an accepted part of the stock-in-trade of the criminologist. At the concluding session of the international congress on criminology on 17th September, a resolution was passed recommending that services for predicting recidivism should be established in the forty-two countries represented. Professor ERWIN FREY, Professor of Penal Law and Criminology at Zurich University, said in his report that it was possible by existing systematic prognostic devices to predict the future recidivism, or non-recidivism, of, for instance, an early delinquent, aged 17, "with such a high degree of probability that any qualified juvenile court could take the prognosis into account in making a decision as to the best kind of treatment." He expressed the opinion that, where courts based their judgment on a thorough knowledge of the whole personal dossier of the accused, there was no harm in giving such courts the results of a systematically built-up prognosis. Where, on the other hand, judges were already some kind of sentencing machine, dealing with a dozen or more different cases in one morning without any real knowledge of the body, character and soul of the human beings they were dealing with, they should certainly not be shown prediction tables, or any other prognostic devices. Professor Frey's view will find support in this country, where the mechanisation of sentencing, a power which demands the application of entirely human qualities, would be considered repugnant.

The Housing Subsidies

THE MINISTER OF HOUSING AND LOCAL GOVERNMENT's statement to the conference of the Association of Municipal Corporations at Harrogate on 22nd September disavowed an intention then and there to announce the Government's policy on housing subsidies; nevertheless it described their "general attitude" towards this problem. The Minister said that the purpose of the subsidy was to help those with insufficient income to bridge the gap between the full economic rent and the amount they could reasonably afford to pay. Large numbers of council house tenants, he continued, were having their rents subsidised to a greater extent than their financial circumstances required. The subsidy on their rent was paid by the general body of ratepayers and taxpayers, many of whom were less well-off and might not enjoy the benefits of subsidised council houses. The Minister said that the remedy rested largely in the hands of the local authorities. Hardship could be avoided by the adoption of differential rent schemes, which ensured that the subsidy, instead of being handed out indiscriminately, was fairly allocated to each according to need. Quite a number of local authorities of different political parties had successfully introduced such schemes. While convinced that the housing subsidy as a whole must be reduced, they were determined to do nothing which might impair the impetus of the all-important drive on slum clearance and on housing the overspill population from the congested cities. He had invited representatives of the local authority associations to discuss this problem with him on 3rd October.

The Juridical Review

THE principal interest for the English reader in the *Juridical Review* for August, 1955, is not so much in the articles dealing with matters legal south of the Tweed, excellent though they are. There is indeed much that will interest solicitors in England in the article on "English and French Legal Methods," by Professor HAMSON, and in that on "Recent Leading English Cases," by Mr. W. A. ELLIOTT. But it is the article on "Recent Leading Scottish Cases," by Professor DAVID M. WALKER, of Glasgow University, in which the English lawyer will find particular fascination. He will find an unusually wide interpretation given to the doctrine of *res judicata* in *Matuszczyk* v. *National Coal Board* [1955] S.L.T. 101 by LORD STRACHAN. *M* had unsuccessfully sued the Board for damages, alleging only breach of the common-law duty of care. He then sued for damages arising out of the same accident alleging breaches of statutory duty which had not been alleged in the former action. The action was dismissed on the ground of *res judicata*. "Must a pursuer marshal all his batteries on the front line at once?" asked Professor Walker. He concluded: "The fundamental justification for this decision is that it prevents a pursuer pressing his defender with one ground of fault after another; it is a distinct widening of the principle of *res judicata*, and it remains difficult to say that common-law fault and breach of statutory duty are the same *media concludendi*." A decision of outstanding importance in the struggle against encroachment by the State was *Glasgow Corporation* v. *Central Land Board* [1955] S.L.T. 155, in which it was held that the Board was a department of the Crown, and the court refused to override its certificate that minutes, circulars and documents, tending to show the methods by which the amounts of development charge in respect of the developments dealt with in the summons were to be calculated, were privileged documents. English readers will also find an interesting analysis by Professor Walker of *Hunter* v. *Hanley* [1954] S.L.T. 303, in which a doctor's divergence from normal practice and its effect on the question of his liability for negligence is discussed.

TRIAL ON INDICTMENT OR SUMMARILY

It is proposed to mention in this article some of the points which a solicitor will consider when advising his client whether to be tried summarily for a criminal offence or to be tried on indictment. Strictly, of course, it is not a matter of law—and perhaps should be outside the scope of this article—to consider whether or not his chances of "getting off" are greater before a jury or not. Such distinguished lawyers as Sir Travers Humphreys and the late Sir Patrick Hastings have said that they have the greatest confidence in the ability of a jury to reach a correct conclusion, but the present Lord Chief Justice does not share that confidence, it seems, so far as some road traffic cases are concerned: see e.g., *R.* v. *Salisbury and Amesbury JJ.*; *ex parte Greatbath* [1954] 2 Q.B. 142; 98 SOL. J. 392. One feels that many prosecuting solicitors will share his view, but, as this is an article on legal matters, this question will not be further pursued.

Merits of trial by jury are that a defendant may in some cases get a fairer trial, e.g., because his bad record may be known to magistrates but will almost certainly not be known to jurors, and also sometimes, one regrets to say, because some Benches have the reputation of being "convicting Benches." Another great advantage is the disclosure to the defence of the case for the prosecution in advance so that there is ample time between the hearing in the magistrates' court and the trial at sessions or assizes to consider that case and to deliberate upon the line of cross-examination and the questions of law. Cross-examination of these witnesses on their evidence before the committing magistrates can be reserved so that counsel is not prejudiced, but this is a course which can be dangerous should the witness die or become insane or too ill to attend the trial or be kept out of the way by the defendant. Then his deposition can be read to the jury (Criminal Justice Act, 1925, s. 13). Should this happen, only the evidence elicited by the prosecution will be before the jury though there is nothing to stop counsel for the defence commenting on his client's unfortunate position. Lastly, should a defendant be acquitted on indictment, there can be no appeal at all by the prosecutor save in the most exceptional circumstances (*R.* v. *Middlesex Quarter Sessions* (*Chairman*); *ex parte Director of Public Prosecutions* [1952] 2 Q.B. 758; 96 SOL. J. 482).

Disadvantages of trial on indictment are that not only will the presiding judge or chairman generally have power to inflict a much heavier sentence than magistrates can but also that such persons frequently are minded to inflict heavy sentences. Being lawyers, they will often pay more attention to directions from the Court of Criminal Appeal as to cases in which heavy sentences should be imposed (e.g., in *Hallett* v. *Newton* (1951), 95 SOL. J. 712, Lord Goddard, C.J., said that in cases of driving under the influence of drink a fine of £5 was insufficient and magistrates should ask themselves why the defendant should not be sent to prison: in fairness to the Lord Chief Justice, who has been criticised for this, it should be said that he referred only to cases of driving under the influence and not to cases of merely being in charge of a motor vehicle, and in *Jones* v. *English* [1951] 2 All E.R. 853; 95 SOL. J. 712, he was much more tender towards a person who was in charge of a motor lorry). Further, a trial on indictment will be more costly to the defendant and will lead to greater delay. It is true that an acquittal by magistrates can be the subject of an appeal by the prosecutor on a point of law only (or on a question of fact in cases to which the Customs and Excise Act, 1952, s. 283, applies), but, if the defendant is convicted by the magistrates, he has not only an appeal by case stated on a point of law but also the alternative of a full re-hearing of the case on an appeal on fact to quarter sessions. Thus, he can reshape his strategy, as it were, by eliminating unsatisfactory witnesses for the defence or calling fresh ones on the hearing of the appeal. Should he have been convicted on indictment, the Court of Criminal Appeal will only in the rarest circumstances allow further evidence to be called, nor will they interfere with the conviction unless the verdict of the jury was obviously against the weight of evidence or there was some serious misdirection or irregularity. If the defendant successfully appeals to quarter sessions from a conviction by magistrates, however, the prosecutor still has a right of appeal to the High Court on a point of law pursuant to the Criminal Justice Act, 1925, s. 20, though the defendant has it also, if unsuccessful. Lastly, if the accused is acquitted by the magistrates, he can never be tried again for the same offence. If he elects to go for trial and the magistrates do not find the case against him sufficiently strong to send him to sessions but discharge him, the police can start fresh proceedings should further evidence come to light or, if the prosecutor feels that the discharge by the magistrates was perverse, he can apply for a bill of indictment to be preferred against him pursuant to the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2.

Another question which the solicitor must consider in this connection is whether his client can opt to be tried by jury at all. Some cases obviously must be tried by jury, e.g., murder, and others cannot be tried by jury at all as they are punishable on summary conviction only, e.g., careless driving. The general rule is that, if the punishment on summary conviction exceeds three months' imprisonment, the accused can elect to be tried by jury unless the charge is one of assault or under the Vagrancy Act, 1898. "Assault" seems to include assaults on the police, contrary to the Prevention of Crimes Act, 1871, s. 12, and assaults which are regarded by the magistrates as aggravated ones on women and children. Certain statutes seldom met with also give a right of trial by jury for offences under them even if the punishment does not exceed three months' imprisonment. There are also various statutes and regulations creating offences which are expressed to be triable either summarily or on indictment and declaring that the punishment on summary conviction shall be three months' imprisonment or less, e.g., the Road Traffic Act, 1930, s. 28 (taking and driving away motor vehicles) and the Defence (General) Regulations, 1939, reg. 92. In such cases, although the accused has no right to insist on being tried by jury, he may ask the magistrates to commit him for trial and it is in their discretion whether or not they do so. In the reference above to offences punishable on summary conviction with more than three months' imprisonment, we include offences mentioned in Sched. I to the Magistrates' Courts Act, 1952, which includes many offences under the Larceny Act, 1916, assault occasioning actual bodily harm, unlawful wounding, malicious damage, and minor offences under the Forgery Act, 1913. Children under fourteen cannot be tried by a jury for any offence save homicide, unless charged jointly with a person who has attained that age. Young persons, i.e., those who have attained the age of fourteen but are under the age of seventeen, have much the same rights of election as adults but are not liable to be committed for sentence under the Magistrates' Courts Act, 1952, s. 29, although they may be committed with a view to being sent to Borstal if they have attained the age of sixteen on the day of conviction (*ibid.*, s. 28).

Even if it is decided that the client shall not claim his right to be tried by jury, the advocate may yet find that either the prosecutor or the magistrates will insist on his being sent for trial. In cases which are punishable either on indictment or summarily, e.g., dangerous driving, taking and driving away motor cars, etc., if the prosecution is being carried on by the Director of Public Prosecutions, his consent is necessary to summary trial, and if it is an offence under the Customs and Excise Acts the consent of the Commissioners of Customs and Excise is likewise necessary (Customs and Excise Act, 1952, s. 283). In charges to which Sched. I to the Magistrates' Courts Act applies (see *supra*) a magistrates' court may not, by s. 19 (7) of that Act, try summarily such an offence without the prosecutor's consent in a case affecting the property or affairs of Her Majesty or of a public body, or in a case where the prosecution is being carried on by the Director of Public Prosecutions. "Prosecutor" seems to mean the person who has laid the information, so that, if a man is charged by a police officer with stealing the property of a municipal corporation, it is that officer who has the right to insist on his being tried on indictment, whatever the views of the corporation may be. Further, the magistrates themselves may decide that the case is a proper one to be sent for trial, even if both prosecutor and defendant desire it to be tried summarily. Magistrates should send a case that is serious for trial on indictment (*R.* v. *Bodmin JJ.; ex parte McEwen* [1947] K.B. 321; 91 SOL. J. 28). Magistrates must also send a case for trial, unless it is expressed to be triable summarily only, (*a*) if a *bona fide* claim of right or title is involved, or (*b*) if it is an assault accompanied by an attempt to commit a felony or one in which a question arises as to the title to any lands or interest therein or as to any bankruptcy or insolvency or execution under the process of any court (Offences against the Person Act, 1861, s. 46). Borough magistrates should also commit for trial any case which can be tried on indictment and in which one of their members or a prominent citizen of the area is involved (*Afford* v. *Petitt* (1949), 93 SOL. J. 648).

If magistrates have once begun to try summarily an offence to which Sched. I to the Magistrates' Courts Act applies, they cannot then decide to commit it for trial (Magistrates' Courts Act, 1952, s. 24). This section would not apply, it is submitted, where they found that they would be going outside their jurisdiction in dealing with it summarily, e.g., when a claim of right was involved or the prosecutor did not consent in a case involving property of a public body. Magistrates who have begun to try summarily a case which is triable either summarily or on indictment, e.g., dangerous driving, may, at any time before the conclusion of the case for the prosecution, discontinue the summary trial and proceed to inquire into the case as examining justices (Magistrates' Courts Act, 1952, s. 18 (5)). It may sometimes happen that a defendant charged with a Sched. I offence, e.g., larceny, consents to be tried summarily and then at a later hearing withdraws his consent and asks to be committed for trial. Where different justices sit at the second hearing, it may well be that he can lawfully refuse his consent to summary trial despite his previous consent for, under s. 98 (6) of the Magistrates' Courts Act, the justices composing the court before which any proceedings take place shall be present during the whole of them. The question is discussed in the *Criminal Law Review* for June and August, 1955. The point may be material where a defendant, finding himself before two magistrates, Smith and Jones, who do not know him at all, consents to be tried summarily and then finds that the case is adjourned immediately without any evidence being taken; at the adjourned hearing, he finds himself before Brown and Robinson, who know that he has a criminal record, and obviously then he may wish to be tried by a jury.

G. S. W.

THE YEAR'S PROCEDURE CASES—III: APPEAL PROCEDURE AND QUESTIONS OF LAW

CASES on procedure are, by the nature of the subject, almost entirely expository of the rules of court. The great majority of those reported are chiefly useful as illustrating the working of a particular rule in a given situation, so that the practitioner ought never to read a case without having in mind the terms of the rule itself. We do not draw principles from these cases, in other words; they may explain the reason for a rule or its proper interpretation, but are not generally independent sources of procedural law.

An exception occurs where the court pronounces on a matter concerning an inherent jurisdiction which it possesses or is alleged to possess. We shall come to a case on this presently, but first let us notice a quasi-exception exemplified in those authorities which supplement a rule by laying down the lines on which some discretion conferred by the rule is to be exercised. For example Ord. 58, r. 4, declares the Court of Appeal to have full discretionary power to receive further evidence on questions of fact, while r. 5 of the same order gives power to order a new trial "if it shall appear to the Court of Appeal that a new trial ought to be had." In interlocutory matters, and in any case so far as concerns events which have occurred since the date of the decision under appeal, no special leave is required to enable fresh evidence to be given before the Court of Appeal. But upon appeals from a judgment after trial upon the merits, further evidence (not being of events subsequent to the trial) is to be admitted "on special grounds only, and not without special leave of the court." Where the proposed further evidence is not documentary, the practice is for an application for leave to be made on motion previously to the hearing of the appeal, and the procedure is also by way of motion to the Court of Appeal where a new trial is applied for under Ord. 39. As to what constitutes a special ground for acceding to a motion for leave to call further evidence, or, generally speaking, a ground for ordering a new trial, there is no guidance in the R.S.C. Consequently the decisions on these topics of the House of Lords and of the Court of Appeal, many of them conveniently summarised in the notes in the Annual Practice, may be looked upon in a special sense as founts of authority in themselves.

All this gives a notable importance to any new statement of the principles followed by the courts in such matters. Denning, L.J., in *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489; 98 SOL. J. 870, was dealing with a case where a witness at the original trial was said to be prepared to admit that she had then told a lie and now wanted to tell the truth. But he prefaced his opinion with a valuable resumé of the conditions on which fresh evidence will be admitted on appeal or a new trial ordered. "First," he said, "it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important

influence on the result of the case, though it need not be decisive; thirdly, the evidence must be . . . apparently credible, though it need not be incontrovertible." In *Ladd's* case the court was not satified, from the affidavits before it on the motion, that the witness's original evidence was given as a result of coercion, nor was there any suggestion of bribery or of mistake. This led the court to conclude that the new evidence she proposed to give was not such as was presumably to be believed; in other words it was not apparently credible. The motion failed.

Order 58 is mentioned in a practice note at [1955] 1 W.L.R. 351; *ante*, p. 235, where a point which arose in *Parish* v. *Birch Bros. (Dover), Ltd.*, is clarified. Rule 3 of the order lays down the length required of a notice of appeal at fourteen days in the case of an appeal from any judgment, whether final or interlocutory, or from a final order; and four days for an appeal from any interlocutory order. Any doubt as to what orders are final and what interlocutory is to be settled by the Court of Appeal (Judicature Act, 1925, s. 68 (2)), but by another rule (r. 8) the proper officer of the Court of Appeal is to set down appeals in the "proper list." It is well known that a final list and a separate interlocutory list are kept. Thus the proper officer has to make at least a provisional decision as to which is the proper list before the matter can come before the court. It was apparently with this situation in mind that Evershed, M.R., gave it out that for the convenience of the court and also of litigants it had long been the practice to give the chief registrar a wide measure of discretion as regards form in accepting notices of appeal as proper or sufficient. Where points of substance appeared to arise the registrar would always consult the president of the appropriate division of the court.

The extensive nature of the powers of the Court of Appeal was stressed by both Singleton and Morris, L.JJ., when they gave the majority judgments in *Thynne* v. *Thynne* [1955] 3 W.L.R. 465; *ante*, p. 580. The court has by statutory rule all the powers and duties as to amendment and otherwise of the High Court and also the power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. It was, however, under the inherent jurisdiction of the court to do what is necessary and proper to correct an order rather than under any specific rule that the majority felt able to order the amendment sought in that case. The circumstances appear unusual, yet something similar had happened at least twice before, and if and when they occur again the judgments in *Thynne* v. *Thynne* will rank as first-hand authorities. Of two ceremonies of marriage between the parties, only the second had been referred to in the petition for dissolution or at the hearing, and consequently the decrees *nisi* and absolute purported to dissolve that marriage. The mistake having come to light, the court held that it had power to rectify it. The court below had intended to end the marriage that in fact subsisted between the parties. Therefore the court could amend the decrees so that they accurately expressed and carried out that intention. Some judicial ingenuity was called for to avoid suggesting that the court of first instance had itself dealt with the earlier ceremony. The decrees could not be simply rewritten in their allusions to the marriage. This problem was solved by directing that the references in both decrees to the date and place of the marriage should be struck out, and an explanatory note made on each document.

One of the shortest speeches reported from the Appellate Committee of the House of Lords is that in *B* v. *B* (*No. 2*) [1955] 1 W.L.R. 557; *ante*, p. 334. The Lord Chancellor simply announces that having considered all the points put before them the committee have come to the conclusion that the case is covered by s. 27 (2) of the Judicature Act, 1925. The case was one in which the Court of Appeal had refused leave to appeal to the House of Lords from their order that a child should be brought up in the Roman Catholic religion, as her father desired. The original application had been made (albeit after decree absolute) in divorce proceedings. Hence the relevance of s. 27 (2). Though the Court of Appeal decision was one concerning the education of a child, the effect of the ruling of the House was that it nevertheless related to a matrimonial cause or matter, so that under the subsection it was final except on any question of law on which the Court of Appeal might give leave to appeal. The petition of appeal was dismissed as incompetent to be heard.

The strict control by statute of rights of appeal, as contrasted with the very wide powers of the court in dealing with an appeal properly brought, is one of the morals to be learned from *Healey* v. *Minister of Health* [1954] 3 W.L.R. 815; 98 Sol. J. 819. "The courts will not usurp an appellate jurisdiction where none is created," says Morris, L.J. In the case of an appeal from a court of law strictly so called, any challenge to the jurisdiction is normally made by the respondent at the opening of the appeal. That was the course taken in *B.* v. *B.* (*No. 2*). But in *Healey* the matter arose in another way. The plaintiff did not purport to appeal against the decision of the Minister which aggrieved him. That decision, conveyed in a letter, was to the effect that the plaintiff was not a mental health officer within the meaning of the appropriate regulations. The plaintiff's counter-blast was an action against the Minister claiming a declaration from the court that he was such a mental health officer. Confining our attention to the procedural aspect of the case, we may observe that the Minister's defence raised a plea in bar contending that the court had no jurisdiction since the regulations rendered the Minister's determination final and not subject to review or appeal. This is a point of law such as any party is by Ord. 25, r. 2, entitled to raise by his pleading, and such as may by the same rule be disposed of by the judge at or after the trial, or, by consent or by order, set down and disposed of at any time before the trial. The point was in fact set down as a preliminary one, and Cassels, J., and the Court of Appeal held that the objection succeeded.

A preliminary point was also successfully raised before the evidence had been read on the originating summons in *Re Hooker's Settlement* [1954] 3 W.L.R. 606; 98 Sol. J. 750. As a result, Danckwerts, J., held that he could not further hear the summons and must dismiss it. The application was for an order consenting to the execution of a deed under a clause in a settlement which purported to empower the settlor "with the consent of a judge of the Chancery Division" to revoke or vary the trusts. Such a private attempt to compel a judge to adjudicate on a matter not provided for by the law was, his lordship said, inconsistent with the proper practice of the courts. (If we were dealing with the substantive as well as the procedural side of this case we should have to emphasise that it does not touch those conveyancing precedents which give a power of variation to trustees subject to their right to apply to the court for directions as to its exercise.)

There are, of course, other methods of raising points of law. A summons to strike out a statement of claim or a defence may, by Ord. 25, r. 4, be brought before the master on the ground that the pleading in question discloses no reasonable cause of action or answer. Or under Ord. 34 a special case may be stated by order or consent so that a question of law

between the parties may the more cheaply be decided. This form of short cut, obviating the necessity for calling or filing extensive evidence, is equally applicable whether the action or matter is begun by writ or originating summons (*Re East Yorkshire Gravel Co., Ltd.'s Application* [1954] 3 All E.R. 631).

Where a point of law is the only bone of contention there is no doubt that the rules we have mentioned in the last three paragraphs are well adapted to dispose expeditiously of the whole matter. Sometimes, however, there are disputes of fact as well as law. Now the only way to determine disputed facts is to go to trial. Accordingly the success of an attempt to save time and money will often depend on which way the court decides the preliminary issue of law. If the result goes against the plaintiff then, subject to his right of appeal on the preliminary point, that can conclude the most rancorous dispute. But if the court should throw out the objection of law, the facts probably still have to be investigated. This is substantially what happened in *Donoghue* v. *Stevenson*—whatever may be the truth of the story (declared apocryphal in some quarters, but recently rediffused by Jenkins, L.J.) that there turned out to be no snail in the bottle after all. And this is what caused the Court of Appeal much concern in *Adler* v. *Dickson and Another* [1954] 1 W.L.R. 1482; 98 SOL. J. 869. There a preliminary objection had been taken and without any delay overruled in the Queen's Bench and Court of Appeal. We are told that only four and a half months elapsed between the time when the issue was ordered to be tried separately and the date of the decision on appeal. Not satisfied, the defendants wished to press their objection in the House of Lords. It was with a view to having the facts ascertained before the memories of witnesses should fade that the Court of Appeal was at first disposed to defer the question of giving leave to go to the House on the preliminary point until such time as an appeal on the facts should come before the court.

There was, however, a difficulty about adopting this course. The rules of the House of Lords stipulate that an appeal to the House must be lodged within six months of the date of the last order appealed from. Six months is certainly not a comfortable period to cover the full trial of an action not yet set down and an appeal as well. The diplomatic decision announced by Denning, L.J., was that leave would be refused, leaving the defendants to go to the Appeals Committee of the House of Lords for leave. The House could give the appropriate direction as to the order of future events and as to costs.

J. F. J.

EVIDENCE OF A WITNESS ABROAD—I

A PREVIOUS article (98 SOL. J. 676) discussed the circumstances in which an order may be obtained under R.S.C., Ord. 37, r. 5, for the taking on commission of the evidence of a plaintiff in, and of a defendant to, an action in the courts here, who is resident outside the jurisdiction, and the principles which govern the grant or refusal of such an order. In this article it is proposed to consider the case where it is desired to obtain an order for the taking on commission of the evidence of a witness who is resident outside the jurisdiction, and to see whether or not different principles from those applicable in the case of a plaintiff or a defendant apply in such a case.

In order to understand the practice the relevant words of Ord. 37, r. 5, should be borne in mind. Paragraph (1) provides that: "The court or a judge may, in any cause or matter where it appears necessary for the purposes of justice, make an order for the examination upon oath before the court or a judge or any officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give on deposition any evidence therein," and para. (2) provides that: "Any order under para. (1) of this rule may be made on such terms (including, in particular, terms as to the giving of discovery before the examination takes place) as the court or judge may think fit."

It was shown in the previous article that there is a marked difference between the case where a plaintiff is seeking a commission to examine himself abroad, and the similar case of a defendant. How, however, does the matter stand in a case where an order is sought to examine, not a party, but a witness? On this matter, in referring to an application for such an examination under the predecessor to the present r. 5 (1), Cotton, L.J., says this in *Lawson* v. *Vacuum Brake Company* (1884), 27 Ch. D. 137: "Ought that application to be granted? It depends on the rule that the court or a judge may order examination of a witness before an examiner where it shall appear necessary for the purposes of justice. The application of that rule must of course depend on the circumstances of each individual case. There is a great difference between a plaintiff and a mere witness as to being examined abroad." (See also *Nadin* v. *Bassett* (1883), 25 Ch. D. 21; *Light* v. *The Governor and Company of the Island of Anticosti* (1888), 4 T.L.R. 430.)

It is necessary therefore now to see what this difference is. As regards the general principles upon which such an application falls to be considered, Bagallay, L.J., in *Lawson's* case says this, in connection with an application to have the examination of a particular witness, an American citizen, taken in Chicago, after reading the then r. 5: "Therefore there is no doubt that the court has jurisdiction to grant the application. But on what principles is that jurisdiction to be exercised? The court, in considering an application of this nature, will no doubt take into consideration the difference between the expense of the witness being brought over to this country and of his being examined abroad, and the inconvenience, apart from the expense, which may be occasioned by compelling him to leave his occupation in a foreign country and come over to this country to be examined. But it appears to me that if an application is made (whether it is made by the plaintiff or by the defendants) for the examination of a witness abroad, instead of his attending in this country to give evidence at the trial, it is the duty of the party making that application, when making it, to bring before the court such circumstances as will satisfy the court that it is for the interest of justice that the witness should be examined abroad." As regards the examination being "necessary for the purposes of justice" within the meaning of the rule, Lindley, L.J., in the same case explains it by saying: "It means, I suppose, for the purposes of justice between the plaintiff and the defendant." And in *Berdan* v. *Greenwood* (1880), 20 Ch. D. 764, Bagallay, L.J., says: "Of course, 'for the purposes of justice' does not mean in the interest of either party to the litigation, but in the interest of all parties to the litigation. . . . But we must regard the interests of justice, the interest of the defendants as well as that of the plaintiff, and of course we must consider the nature of the issues which are raised in the pleadings." It appears, however, that the granting of an order for such an examination was not always regarded as a matter of discretion, the view being at one time held that the

obtaining of an order in such a case was a matter of right. (See *Kemp* v. *Tennant* (1886), 2 T.L.R. 304; and *per* Field, J., in the Divisional Court, *Coch* v. *Allcock* (1888), 21 Q.B.D. 1.) Upon the appeal to the Court of Appeal, however, in this last case (21 Q.B.D. 178) such a view was discountenanced, and Lord Esher, M.R., emphasises afresh that the matter is one of discretion, and he restates the general principle, saying: "It is clear that, according to the established practice, it is a matter of judicial discretion, and the commission ought only to be granted on reasonable grounds being shown for its issue. The matter being one of discretion, it is impossible to lay down any general rule as to when a commission will be granted. It must depend on the circumstances of the particular case. The court must take care on one hand that it is not granted when it would be oppressive or unfair to the opposite party, and on the other hand that a party has reasonable facilities for making out his case, when from the circumstances there is a difficulty in the way of witnesses attending at the trial. All the circumstances of each particular case must be taken into consideration." (See also *Butterfield* v. *Financial News* (1889), 5 T.L.R. 279.) The fundamental principle, therefore, which emerges from the above cases as governing the grant of an order for the examination of a witness abroad is that it is for the party making application for an order to bring before the court such circumstances as will satisfy the court that it is for the interest of justice, not for the interest of either party to the litigation, but for the interest of all the parties to the litigation, that the witness should be examined abroad. Further, that the granting of such an order is a matter for the discretion of the court depending upon all the circumstances of each particular case.

The most recent case where an order for examination has been refused is that of *Sinatra* v. *Mills, Gourlay and London Express Newspaper, Ltd.* (*The Times*, 16th March, 1955), the facts of which illustrate certain main aspects of the discretionary nature of the granting of such an order. In this case an order was refused for the examination in this country of an American citizen, a Mr. Broccoli, who happened to be resident in this country within the jurisdiction at the time when the application for the order was made. He was a film executive, head of Californian and English film companies, his headquarters being in California, and the nature of his work requiring him to be in many parts of the world, and he from time to time being in this country. The plaintiff was bringing an action for libel, to which the defences were justification, in respect of an incident at a certain club, of which the first defendant was secretary, at a time when the plaintiff and his wife were guests of Mr. Broccoli and his wife at the club. Mr. Broccoli was his host and therefore the best person to give evidence as to what had taken place, but he had stated in his affidavit that he was not prepared to make a special journey to England to give evidence in the action, because his business interests would not permit it. As regards the order itself, at the hearing of the application the master (Master Clayton) had made the order for the examination, but this order had been reversed by Donovan, J., and an appeal from this reversal was dismissed by the Court of Appeal. In support of this appeal, counsel for the plaintiff stated that Donovan, J., had acceded to the arguments for the defendants that, as it was a jury case, the witness ought to be heard and seen by the jury, and that it would be perfectly simple for the plaintiff, who was a man of substance, to bring the witness from California. He (counsel) stated that it would be an intolerable hardship on the plaintiff if he had to go into court to meet a plea of justification suggesting that he was a man not fit to enter a night club, and be unable to produce before the court the evidence of a man who was his host and was sitting at the table at the moment the incident took place, and who was the best person to rebut any charge of impropriety on the plaintiff's part. The plaintiff was utterly unable to bring this witness to this country for the purpose of the action. The only certain way the evidence could be given was to have the examination. In reply, counsel for the second and third defendants stated that Donovan, J., had taken the view that no sufficient evidence was before him on which he could be satisfied that the attendance of the witness could not be procured at the actual trial. In any case, and particularly in a jury case—and the plaintiff had elected to have a jury—it was desirable that the witnesses of facts which were to be seriously contested should be seen by the jury.

In his judgment dismissing the appeal, with which Parker, L.J., agreed, Denning, L.J., stated that the action was ready for trial by a jury, but the plaintiff now made an application for the evidence of Mr. Broccoli to be taken on commission. It was quite clear that Mr. Broccoli travelled about the world a lot. He was in this country at the moment and had considerable business interests in this country which made his presence here quite frequent. On the whole of the material before the court, he (his lordship) was not satisfied that Mr. Broccoli could not be in this country to give evidence at the material time; the necessary qualifications for evidence on commission were not present. That was how it had appeared to the judge and how it appeared to him (his lordship). He agreed that Mr. Broccoli was a most important and material witness. In all probability, he would be here at the relevant time, or the trial could be fixed for a time when he was likely to be.

Two main points would appear to arise from the judgments in the two appeals as forming the basis of the refusal of an order for examination, namely, (1) the view taken, both by Donovan, J., and by Denning, L.J., that no sufficient evidence had been produced before Donovan, J., on which he could be satisfied that the attendance of the witness could not be procured at the trial, and (2) the view taken by Donovan, J., that, as it was a jury case, the witness ought to be heard and seen by the jury. These two main points will be examined in a later issue, but before doing so it may be first observed that this appeal is concerned with an order for the examination of a witness in this country, whereas the subject-matter of this article concerns an order for the examination of a witness out of the jurisdiction. It is, however, under the rules of the same order (R.S.C., Ord. 37) that an order is made for an examination, whether the witness to be examined is in this country or is out of the jurisdiction. Thus, in *Bidder* v. *Bridges* (1884), 26 Ch. D. 1, which concerned an order which had been made to examine in this country *de bene esse* thirty witnesses over seventy years of age, the rule which was in force at the time when that order was made was r. 5, which, apart from certain minor verbal amendments and the specific power to impose conditions upon the making of an order, now set out in para. (2), was in identical terms with the existing r. 5. In his judgment, Cotton, L.J., says: "Of course questions have been discussed on applications to examine witnesses abroad, but this question, as far as I know, has not arisen. Now there is an order which the Lord Chancellor did not in terms refer to, although he did impliedly, besides those which he mentioned, namely, the first rule of Ord. 37, which provides that subject to these rules the witnesses at the trial of any action are to be examined *vivâ voce* in open court, and therefore, in order to exempt a party from the necessity and the prejudice, if he cannot bring the witnesses into open court, of not being able to do so, one must see that

there is something in these rules which enables the court to direct that the examination of the witnesses shall be taken in some different way, and that is r. 5." He then refers to r. 5, and continues: "That applies to this case just as much as it does to the examination of witnesses abroad." It may also be noted that in this particular case the witness sought to be examined, Mr. Broccoli, was an American citizen who had his business headquarters in California, and was not prepared to make a special journey to England to give evidence in the action, because his business interests would not permit it. It was, therefore, as it is stated in the report in *The Times*, by chance that he was in this country at the time when the application to take his evidence before an examiner was made to the court. Had Mr. Broccoli, therefore, returned to California before an application had been made to examine him, the matter would have been decided upon an application to examine him as a witness who was out of the jurisdiction (*Cf. New* v. *Burns* (1894), 43 W.R. 182). M. H. L.

A Conveyancer's Diary

LIABILITY OF ADJOINING OWNER FOR NUISANCE ON HIGHWAY

THERE are some observations in the judgment of the Court of Appeal in *Penney* v. *Berry* [1955] 1 W.L.R. 1021, and p. 579, *ante*, which may mislead if the particular facts of that case (to which, of course, they were directed) are not constantly borne in mind. The defendant's house had a coal-hole in the pavement adjoining it, and when the defendant bought the house the hole was covered by a metal slab set in a large flagstone. Later the local authority raised the level of the pavement and in doing so altered the position of this coal-hole and fitted the slab in a concrete surround. The slab rested on a rebate in the concrete, but the top was not flush with the pavement and projected on one side. The plaintiff tripped over the slab, and she brought an action for damages in nuisance against the defendant. Her action was dismissed by the county court judge on the ground that the defendant was under no obligation to abate the nuisance which had been created by the local authority, and this decision was affirmed by the Court of Appeal.

One of the ways in which the plaintiff's case was put before the latter court was that the defendant had adopted the nuisance because, having full knowledge of its existence and ample time to abate it, he had failed to do so, and on the principle laid down in *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880 he was therefore as much liable for any consequence of the nuisance as if he had himself created it. Parker, L.J. (who delivered the judgment of the court), pointed out that in *Sedleigh-Denfield* v. *O'Callaghan* the nuisance in question had arisen on private land, the defendant's own land, and he went on as follows: "In the present case there is no question of a nuisance having been created on land belonging to the defendant, and in cases such as this the general principle, as I understand it, is that there can be no duty on the owner of the land adjoining the highway where the nuisance is to abate the nuisance because the liability is, primarily at any rate, on the local authority, and unless he has some statutory power to do so the owner has no right to go on to the pavement and to abate the nuisance. As Shearman, J., put it in *Horridge* v. *Makinson* (1915), 84 L.J.K.B. 1294: 'In my opinion the cases show that a liability is cast upon the owner of the house, in respect of the nuisance, only where such owner has a duty to abate the nuisance, and he fails to do so.' I think I might add that it is only when such owner has a duty and a power to abate the nuisance."

The distinction which was drawn between *Sedleigh-Denfield* v. *O'Callaghan* and the case under appeal, therefore, was that in the latter case no nuisance had been created on land belonging to the defendant. It was apparently assumed (and no doubt rightly) that the location of the nuisance was the highway, and that the highway was vested in the appropriate local authority. But there may well be cases where the location of a nuisance of this kind, although in a highway, is on land belonging to the owner of the land which adjoins the highway. At common law the ownership of land over which a highway passes is in the owners of the land adjoining on either side, and the statutory provisions which vest certain highways in local authorities of one kind or another only interfered with this position to a strictly limited extent. It is, at most, only the surface and materials of the highway which are vested in the local authority (see Public Health Act, 1875, s. 149, and Local Government Act, 1929, s. 29, and *Tunbridge Wells Corporation* v. *Baird* [1896] A.C. 434). The subsoil remains in the owner of the adjoining land, and he is entitled to place cellars there, provided that the rights of the public over the highway are not thereby infringed. Each case depends upon its own circumstances, but it is quite possible that an opening into a cellar below a highway and the materials of which it is made should be in the ownership of an adjoining owner.

In the recent case the nuisance, apparently, consisted not in the defective condition of the metal slab which covered the coal-hole or in the bedding on which it rested, but in the way in which the slab and its bedding had been inserted into the pavement: it was the state of the pavement and not the state of the slab and its bedding which created the nuisance. If, then, the pavement was vested in the local authority as part of the highway, as the statement that there was no question of any nuisance having been created on the land of the defendant indicates, the conclusion that the defendant was not liable (or at any rate not liable in the absence of some specific statutory obligation on his part to remove the nuisance) was inevitable; but it seems to me that in similar cases what appears to have been assumed in this case as to the ownership of the *locus in quo* of the nuisance may well be the subject of argument. If it can then be established that the nuisance was created on the land of the adjoining owner, and that the owner did nothing about it, he may well be held liable as having adopted and continued the nuisance, on the principle of *Sedleigh-Denfield* v. *O'Callaghan*.

In such a case as that, I apprehend, the principle which Shearman, J., referred to in *Horridge* v. *Makinson* and which Parker. L.J., adopted in his judgment in the recent decision would not apply. From a plaintiff's point of view that is probably just as well, for the concept of a duty to abate a nuisance is not an easy one. The abatement of a nuisance is more often referred to as a right. In the case of nuisances on a highway, which are of course public nuisances,

members of the public have certain limited rights of abatement, e.g., to remove an obstruction in so far as such removal may be necessary for the exercise of his right of passage by the person who abates the nuisance. But it has long been established that this right to abate a public nuisance on a highway does not entitle any member of the public to repair a highway on or in relation to which a nuisance has arisen by mere non-repair of the highway: see, e.g., *Campbell Davys* v. *Lloyd* [1901] 2 Ch. 518. The duty to abate a public nuisance of which Shearman, J., spoke would not therefore apparently extend in any circumstances (statutory liability apart) to the making good of the consequences of a mere non-feasance on the highway, for the adjoining owner would not have, in the words of Parker, L.J., the power to abate the nuisance; and as regards nuisances which arise from acts of commission (such as that in *Penney* v. *Berry*) *prima facie* the right of abatement would seem to be exercisable only by a person who suffers from the nuisance, and if a defendant were to deny that he had suffered from the nuisance, it would be strange that a duty should be thrust on his shoulders to remove something which he has, apparently, otherwise no right to touch.

The surest way to maintain a successful action for damage suffered as the result of some obstruction or defect in a highway against an adjoining owner is to rest liability on ownership of the locality of the nuisance; and having regard to the way in which the legislation vesting highways in public authorities has been interpreted by the courts, there is a good deal of scope here. *Penney* v. *Berry* was, in this respect, a somewhat unusual case. From the property owner's point of view, the liability may be a serious one, since the rights of various authorities over the highway are so extensive that it is often a difficult matter to keep his own property on the highway in good repair, both as a unit and in relation to the surface of the highway. But if his own property does become defective as the result of the activities of others, there may well be liability on the ground that a nuisance has arisen and been adopted by the adjoining owner although he himself has done nothing to contribute to the defect. The *ratio decidendi* of *Penney* v. *Berry* was, as I understand it, not that the defendant did not create or did not adopt the nuisance, but that he was not liable because what happened had not taken place on his land.

"A B C"

Landlord and Tenant Notebook

"PERSISTENT DELAY IN PAYING RENT"

One of the grounds on which a landlord may oppose an application for a new tenancy of business premises, made under s. 24 (1) of the Landlord and Tenant Act, 1954, is "that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due" (s. 30 (1) (*b*)). An allegation to this effect may also figure in a notice to terminate given under s. 25, which notice has (by subs. (6)) to state whether the landlord would oppose an application for the grant of a new tenancy and, if so, specify one or more of the grounds mentioned in s. 30.

In general, the Legislature may be said to regard punctuality in the matter of payment of rent as a virtue, but not as a supreme virtue. On the one hand, none of the numerous statutes modifying and regulating a landlord's right to distrain disentitles him to make a levy as soon as any rent is overdue (i.e., the day after it has become due: *Duppa* v. *Mayo* (1669), 1 W. Saund. 275), but he may not sell the distress till at least five days have elapsed (Distress Act, 1689, s. 1, which measure conferred the right of sale); and the essential object of the Landlord and Tenant Act, 1730, substantially re-enacted by the Common Law Procedure Act, 1852, s. 210, was to limit the indulgence of Equity in granting relief against forfeiture for non-payment of rent. On the other hand, where what is now the Agricultural Holdings Act, 1948, concerns itself with the matter, which it does in connection with notices to quit, it deprives the tenant farmer of his right to serve a counter-notice if at the date of the giving of the notice to quit the tenant has failed to comply with a notice in writing served on him by the landlord requiring him within two months from the service of the notice to pay any rent due in respect of the agricultural holding to which the notice relates (s. 24 (2) (*d*)). And where rent control legislation concerns itself with the matter, which is of course in connection with recovery of possession, one of the "grounds" is that any rent lawfully due from the tenant has not been paid (Rent, etc., Restrictions (Amendment) Act, 1933, Sched. I, para. (*a*)).

The Agricultural Holdings Act, 1948, provision does not appear to have produced any authorities, though *Sharpley* v. *Manby* [1942] 1 K.B. 217 warrants the suggestion that a notice of an estate rent audit will discharge the function of a notice requiring payment of rent due. The rent control provision has, as one would expect, displayed greater fertility; for while no delay is allowed, the "overriding requirement" of reasonableness, and the power to suspend orders, have played considerable parts in cases arising under the paragraph cited. Apart from these considerations, mere unpunctuality has been shown to be insufficient as a ground: once the rent has been paid (or tendered), a landlord cannot issue a summons in reliance on the provision, which demands not only that rent be due but also that it has not been paid (*Bird* v. *Hildage* [1948] 1 K.B. 91 (C.A.)); on the other hand, payment of arrears into court will not in itself save the tenant, and in such circumstances the question of his record as a payer may be raised when the reasonableness of making an order comes to be considered. In *Dellenty* v. *Pellow* [1951] 2 K.B. 858 (C.A.) it was said that it would not be normally reasonable to make an (absolute) order if arrears had been paid into court or tendered before judgment, but that where, as in the case before the court, there was a long record of rent default, it was not unreasonable to grant possession.

The last mentioned decision may, I shall presently submit, prove of some assistance in interpreting the Landlord and Tenant Act, 1954, s. 30 (1) (*b*), though the rent control provision does not use the word "persistent." That adjective is used to qualify human conduct or misconduct by the Summary Jurisdiction (Married Women) Act, 1895, s. 4: any married woman whose husband shall have been guilty of persistent cruelty to her may apply, etc. It has been held that "persistent" was not inserted for nothing, as it were; "persistent cruelty means more than cruelty": Evans, P., in *Cornall* v. *Cornall* (1910), 74 J.P. 379, holding that though one violent assault might suffice for a petition for judicial separation, it could not justify an order under the Summary Jurisdiction (Married Women) Act. This authority may conceivably prove of some use in cases under the Landlord and Tenant Act, 1954, Pt. II; not so *Broad* v. *Broad* (1898), 78 L.T. 687, showing that an aggrieved wife may rely on a

number of less serious assaults committed in one day; rent is rarely due so often.

What perhaps needs most emphasising in the Landlord and Tenant Act, 1954, s. 30 (1) (*b*), is the "*ought not* to be granted a new tenancy." The "ought not to be granted, etc.," is a feature of the first three grounds on which an application may be opposed, and does not occur in the other four. Thus, where disrepair which infringes the tenant's obligations, or other substantial breaches of his obligations, are relied upon ((*a*) and (*c*)) the court has, as it has in the case of persistent delay in paying rent, to form a moral as well as an intellectual judgment of the situation; and that is where *Dellenty* v. *Pellow*, *supra*, might afford guidance. Indeed, but for this, it might be possible for a landlord to qualify for opposition rather easily; take the case of rent payable on the usual quarter days: default in the Christmas rent is not easily avoided, at all events if 25th December should fall on a Friday ("Post early for Christmas" should not be applied to payment of rent; apart from the risk of loss of the missive, as to which see *Hawkins* v. *Rutt* (1793), Peake 248, such payment is "voluntary and a payment of a sum in gross, and no satisfaction in law": *Clun's* case (1613), 10 Co. Rep. 127*b*, and the tenant may find himself in difficulties if the reversion changes hands before the quarter-day). So, while the "ought not to be" does not make the practitioner's task an easy one, I submit that not only the frequency of default will prove a factor, but also the amount of delay, the amounts of the arrears and, possibly, the conduct of the landlord in acquiescing in the delay.

A practical point worth considering in relation to tenancies of business premises, and one indirectly connected with the subject of this article, is the advisability of written agreements containing forfeiture clauses. Before Pt. II of the Landlord and Tenant Act, 1954, became law, a proviso for re-entry in, say, a weekly tenancy agreement would seem somewhat out of place; a notice to quit would achieve the object more expeditiously. But now—though many landlords appear not to have appreciated it—a six months' notice is necessary to terminate such a tenancy; and if the premises are, say, a lock-up store-room the levying of distress may be a difficult undertaking. But Parliament has not seen fit to increase any existing difficulties that attend forfeiture (indeed, the above-mentioned Agricultural Holdings Act, 1948, reflects the Legislature's approval: the model tenancy agreement contemplated by the Act is to contain "a power for the landlord to re-enter on the holding in the event of the tenant not performing his obligations under the agreement": s. 5 and Sched. I, para. 9); and the security of tenure provisions of the Landlord and Tenant Act, 1954, Pt. II, "shall not prevent the coming to an end of a tenancy by . . . forfeiture, or by the forfeiture of a superior tenancy" (s. 24 (2)).

R. B.

HERE AND THERE

TWO SIDES TO THE CHANNEL

THE English, with their optimistic way of ignoring difficulties and offering radiant solutions for the obvious, often talk as if universal international understanding were easy—given tolerance and good nature. That, unfortunately, is taking for granted a lot more than human nature usually gives. Peace does not depend on wanting to be left in peace to enjoy one's television, one's motor-cycle, one's council flat and one's holidays with pay. There's more to it than just enjoying what one's got. Of course, it's quite true that all over the world people eat and drink and fall in love and get married in one fashion or another and earn their living with some sort of work and have time off and raise families of varying sizes. Organised delegations and even individual tourists mostly get on well enough with the natives, but, then, they don't really have to shake down into any sort of a mutual relationship for good and all beyond the realm of picture post-cards and the holiday spirit. It's easy enough to love your neighbour so long as he's not your next-door neighbour. Once you have to cope with the peculiarities of your foreign neighbour (and, of course, he with yours, though you don't often think of it that way round), you begin to realise the vast gulf that separates the religious and philosophical assumptions of the peoples or (if you don't believe that religion has any bearing on life or that the ordinary man has any philosophy) their inherited traditions, scales of values and "priorities." Just look at the two sides of the Narrow Seas to go no further—England mercantile, mechanised, industrialised, labour saving, council-housed, "welfare" conscious in town and country, unquestioningly eager for every new gadget of applied science, to-day, to-morrow and the day after; France, variegated, sub-divided, based on her small earthy farms and individual workshops, something very like a seventeenth-century nation trying uneasily to come to terms with the twentieth century. Oddly enough, the two countries illustrate remarkably vividly the distinction between society and its institutions. The French are always turning their national institutions upside down and inside out, but tenaciously preserving their way of life. The English, while preserving their institutions almost intact, rush headlong into every social experiment from the suppression of the monasteries and the Industrial Revolution to the nationalisation of "health."

THE TWO JUSTICES

THERE is, of course, a fundamental difference between the English and the French approach to the problems of judicial process, the quality of personal responsibility, the objects of punishment and the nature of proof. For the ordinary man, these differences are perhaps obscured rather than exemplified by the curiously dissimilar development of the courts of justice in the two countries emerging from a similar starting point in the early Middle Ages, the *Curia Regis*, the central governing body of the King. To the Englishman it seems natural and inevitable that, as society became more complex, the functions of the *Curia Regis* should become separate and distinct: the executive represented by the King's ministers, the judicial represented by the King's judges, and the consultative represented by the Parliament. That happened in both countries, though by an accident of language what we call the courts the French call the Parliaments and what we call the Parliaments the French call the Estates General. To the Englishman it seems similarly inevitable that the King's justice, superseding local jurisdictions, should be administered by men learned in the law appointed by the King, the fountain of justice, to carry metropolitan law to the farthest confines of the realm. That happened in England but not in France. There a multiplicity of judicial Parliaments with royal authority took root in the provinces as separate entities. Even more curiously (to our current way of thinking), judicial office in the Parliaments became by the fifteenth century the personal property of the

holder, transmissible by inheritance or sale, despite the efforts of the Estates General to prohibit the traffic, and by the start of the seventeenth century it was a legally recognised practice. (Still, remember it's only about a hundred years ago since we were selling commissions in the British army.) One undesigned consequence of freehold tenure of judicial office was a judiciary independent of royal influence, but rather too much inclined to embroil itself in politics. Whereas in England the death of the Sovereign abrogated all judicial appointments, in France the Presidents of the Parliaments symbolised the continuity of justice by never assuming royal mourning. Under the Napoleonic reorganisation of the judicial system, the new courts corresponded to the old Parliaments, but appointment to the Bench was confided to the executive in the person of the Keeper of the Seals. In France, the judiciary is a career entirely separate from practice at the Bar, but it was only in 1908 that an entrance examination was established. To the English mind, both ideas seem equally incongruous.

TWO CASES

THE differences between English and French justice could hardly be more strikingly illustrated than by the cases of Ruth Ellis and old Gaston Dominici; the smooth, inexorable, expeditious, undramatic working out of the first, the passionate, diffuse, oratorical, interminable investigation of the second. Both cases have aroused criticism in both countries, but on very different grounds. Ruth Ellis, being admittedly not insane, shot a man dead and, on her own admission, meant to shoot him dead. She was condemned to death and hanged. There was not the slightest doubt as to the law applicable to her act. It is equally certain that in France she would have got off with a couple of years' imprisonment. Apart from the abolitionists of capital punishment (their thesis stands apart), there was a widespread feeling that the case illustrated the desirability of amending the law to recognise "second degree" murder, something perhaps (if a sufficiently precise definition could be found) corresponding to the coroner's verdict of suicide "while the balance of his mind was disturbed." Such a distinction would, of course, affect the approach to the "crime passionel," though not to it alone, but naturally French observers saw the issue primarily in that light. "For the first time for centuries," wrote a popular picture paper, "a breach was opened in the impregnable citadel of English justice. In not hanging Ruth Ellis, England would disavow her law and officially take cognisance of the drama of passion." In its report, the very restrained proceedings assumed quite a different flavour: "For the first time in an English court the barrister Stevenson boldly attacked a taboo which no one had ever dared to infringe directly." When he closed his case, "by his silence he made the most eloquent possible criticism of the English system. Better than a long diatribe was that phlegmatic demonstration." No one could say that there was anything particularly phlegmatic about the conduct of the Dominici case, the background of which emerged in court as something between a Hardy tragedy and "Cold Comfort Farm." For over three years the thing has been going on. The old farmer has been condemned to death. But public opinion is uneasy about the contradictions and obscurities in the evidence. Above all, was his confession, subsequently repudiated by him, exacted by third degree? Execution is respited and in January, 1955, the Keeper of the Seals orders a fresh inquiry. The judicial authorities are uncooperative and it is not till June that the detectives start at the beginning again with some hundreds of fresh questions for the witnesses. But so far peasant canniness has stone-walled the city police. There has been nothing so long drawn out in the history of British justice since the case of Oscar Slater, but in modern France it is by no means unique. The equally controversial trial of Madame Besnard for alleged mass poisoning is still quite a recent memory.

THE FRENCH COURTS

WHILE the integrity of the administration of justice in France is not in question, its prestige and authority have considerably diminished. One cause is certainly the financial poverty of the judiciary. From the Chief Justice of the Supreme Court of Appeal, the Cour du Cassation, with a salary of about £2,400 a year, down to the junior supplementary judges at the foot of the judicial ladder with about £545 a year (minus a pensions scheme deduction), all are so grossly underpaid that many are in actual embarrassment. Even the High Court judges are given no allowance for secretaries or stationery. Judges may follow no other gainful employment. On the contrary, they are often called on to give their services free in presiding over pensions tribunals, military courts and the like. There are complaints of lack of proper respect being shown to the judges by local authorities, though specific instances vary in significance. The local judge whom the mayor placed after the fire brigade at some public function might console himself with the recollection of his English brother, the Recorder who was not long ago placed after the station master to welcome visiting royalty. But it was going too far to ask the Chief Justice of one of the French islands to take over as his official residence the least respectable house of public entertainment lately disused. Another source of trouble is the rivalry and even hostility between Bench and Bar so that a trial may become a personal issue between judge and advocate. But that sort of thing is almost entirely confined to the theatrical over-heated atmosphere of the criminal courts. A criminal case moves from the examining magistrate (*juge d'instruction*), who controls the police investigation at every stage, to the Chambre des Mises en Accusation, which commits for trial, and finally passes to the assize court. The remedy for most of the ills of which complaint is made lies in enhancing the authority and status of the examining magistrate (who is now usually a young man, often not very experienced), extending the authority of the committing court to get the depositions in perfect order, so that a clear case is presented at the trial, and finally, strengthening the hand of the assize judge to maintain decent order in the proceedings. Aside, one may add that what helps good order above all things in England is that Bench and Bar both grow out of the same institutions, the Inns of Court.

RICHARD ROE.

The MANSFIELD LAW CLUB of the City of London College announces the following programme for Michaelmas term: 13th October, "The Price of Freedom," by the Rt. Hon. Lord Justice Denning; 27th October, "Modern Aspects of the Law of Contract," by Mr. Clive M. Schmitthoff, LL.D., barrister-at-law, M.I.Ex.; 10th November (7 p.m.), "A Moot on Company Law," in the chair Mr. Henry Salt, Q.C., M.A., LL.B., Bencher of Gray's Inn; 24th November, "New Aspects of Constitutional Law," by Mr. C. Locke White, LL.B., barrister-at-law; 8th December, "Modern Industrial Law," by Mr. M. N. Rimel, LL.M., barrister-at-law. The meetings are held at 6 p.m. (unless otherwise stated) at the City of London College, Moorgate, E.C.2. Tea will be available for members and their guests from 5.30 onwards. Visitors are welcome at all meetings.

AN EXPENSIVE SEAT

NOWADAYS almost everyone seems to be grumbling about the increased cost of living their normal life, and about the failure of the Government to do anything about it. Few people, however, can be as shocked at the price of things as Sir Stuart Montagu Samuel must have been at the expense of sitting and voting in the famous 1910–1919 House of Commons as member for the constituency of Tower Hamlets (Whitechapel).

Sir Stuart at the time had long been a sleeping partner in the family firm of Samuel Montagu and Co., foreign bankers, bullion brokers and merchants. This firm had borrowed money from the India Office at various dates between November, 1910, and November, 1912, and had purchased silver on the India Office's behalf between March and September, 1912. On 7th November, 1912, the Prime Minister was asked in the House of Commons at question time whether he was aware of these facts, and when the Government proposed to issue a writ for a bye-election at Tower Hamlets. The Prime Minister referred the question whether these facts constituted Sir Stuart a Government contractor, and so disqualified him from membership of the House, to the Law Officers, who found the question to be so full of difficulty and doubt that it was referred to a Select Committee of the House, who in their turn found it so full of difficulty and doubt that it was referred to the Judicial Committee of the Privy Council who, despite the arguments of two silks, one of whom (Buckmaster, K.C.) eventually became Lord Chancellor, for Sir Stuart, found little difficulty and had no doubt that Sir Stuart was, indeed, disqualified. (Their decision is reported at [1913] A.C. 514.) Accordingly, on 21st April, 1913, the House, on the motion of Sir John Simon, then the Solicitor-General, resolved that Sir Stuart had vacated his seat. This, however, was the least of his troubles, for he was soon re-elected. The taxpayers were left to foot the bill for the election as well as the £1,000 which the deliberations of the Select Committee and Privy Council cost.

As soon as the news of the original parliamentary question was published a covey of common informers sprang upon this promising prey, claiming the penalty of £500 per day which the law inflicts upon persons who sit or vote as members of the House of Commons while disqualified from doing so. On 8th November, the day after the question, two informers named Burnett and Chambers each issued a writ, and a third, Forbes, did likewise the following day. Forbes's action was the first to be heard, and is reported at [1913] 3 K.B. 706. Forbes claimed £46,500 by his writ, but the statement of claim alleged only thirty-five days on which Sir Stuart sat and voted, and therefore claimed only £17,500. The trial was before Scrutton, J., who said that " the case took four days to hear owing to the innumerable objections to evidence and to the plaintiffs' claim which the ingenuity of counsel raised." So great indeed was their ingenuity that two of the defendant's four counsel later became judges, as Lord Merrivale, P., and McCardie, J.

Duke, K.C., first took a preliminary objection that an Act of James I required that the action be brought in the county where the offence had been committed, and that the plaintiff file an affidavit as to that county. Forbes had not filed any such affidavit, but Scrutton, J., held that as the Act on which the plaintiff's claim was based expressly entitled to the penalty the person " who shall sue for the same in any of His Majesty's Courts at Westminster " it necessarily excluded the application of the Act of James I.

The next objection was that the Act of 1782 upon which the plaintiff based his claim applied to the Parliament of Great Britain: the statement of claim alleged that the defendant had sat and voted in the Parliament of the United Kingdom. The plaintiff's counsel argued that the plaintiff did not have to plead the law, and asked for leave to amend if necessary. Judgment on this point was reserved to the end of the case.

The plaintiff called an assistant clerk of the House of Commons to produce the election return book of the House of Commons, and a book containing copies of division lists to show that the defendant had voted on many occasions. The defence objected to both books, as not being the best evidence, but the division lists were admitted as a public document. All the defendant's partners, save one who was ill, had been subpœnaed to produce their counterparts of the deed of partnership and so prove that the defendant was a partner. Lord Swaythling was the first partner called: he objected to produce his counterpart as his partners objected, and it might incriminate him, but his objections were rejected. Similar objections to the production of the firm's correspondence with the India Office succeeded.

The defendant's solicitors' clerk then proved the issue of writs by Burnett and Chambers on the day before the plaintiff's writ, and that these were based on the same occasions as were the plaintiff's claim. This was the only evidence for the defence, and after further lengthy argument judgment was reserved. A week later Scrutton, J., held that only the first informer to issue a writ was entitled to the penalty for each particular occasion on which his claim was based, and that if a statute were recited in the statement of claim it must be the correct one. As Burnett and Chambers were first in the field, Forbes therefore failed. The ingenuity of the defendant's counsel was ill rewarded: it had lengthened the trial to four days, so although the defendant succeeded he was awarded only the costs appropriate to a two-day action.

Burnett had also pleaded the Act of 1782: his case came on a week after Forbes's claim had been dismissed. Burnett was refused leave to amend his claim, and so he too failed, as noted at [1913] 3 K.B. 742.

Meanwhile, on 8th May, 1913, the Government had presented a Bill to indemnify Sir Stuart, but several members opposed the Bill and on 7th August the Government decided they could not proceed with it in the absence of agreement.

Forbes's solicitor (one Percy Bono) learnt his lesson from Forbes's case, and accordingly issued a writ, this time on behalf of one Bird, claiming the same penalties as before but reciting the House of Commons (Disqualification) Act, 1801, which was passed after the Union with Ireland and applied to the Parliament of the United Kingdom. The case came before Rowlatt, J., in February, 1914, and is reported at 30 T.L.R. 323. The defence took most of the points which they had taken before Scrutton, J., and also argued that an Act of Elizabeth or the Act of 1782 imposed a period of limitation of twelve months, and that the action must fail because the statement of claim alleged that Sir Stuart was elected an M.P. on 10th January, 1910. In fact he had been twice elected in 1910, but not till after 10th January, which was the date of dissolution of the preceding Parliament. The Parliament in which he was sitting at the time of the offences alleged in the statement of claim was not elected until December, 1910, in the second election of that year, the year of the Lloyd George Budget. However, the plaintiff

was given leave to amend his statement of claim to cover this point, as he could not thereby prejudice rival claimants. Rowlatt, J., held that the previous actions based on the wrong statute were no bar to Bird's action, which was the first one based on the Act of 1801, that the plaintiff had failed to prove one occasion on which the defendant had voted as in fact he had voted after midnight on that occasion and therefore not on the date alleged, that the plaintiff had failed to prove the defendant was a contractor at the time of three more occasions, and that the twelve-month period of limitation applied and defeated the claim as to seven more of the occasions. This left twenty-six occasions, and judgment was given for the plaintiff for £13,000 and costs. An appeal was threatened but was apparently not proceeded with. Three years later Mr. Bono was instructed by another common informer to bring similar proceedings against Waldorf Astor, but these failed (see 33 T.L.R. 386).

Perhaps the biggest scare which M.P.'s had from the law as to Government contractors occurred in 1931, when it was suddenly realised that every M.P. with a telephone had a contract with the Crown about it: an Act permitting this was hurriedly passed, and no penalties were paid.

Presumably Sir Stuart paid the £13,000, but it may console his shade to know that the Government are now doing something about it. If the House of Commons (Disqualification) Bill becomes law disqualified M.P.'s. will no longer be exposed to common informer actions after the present Parliament has been dissolved.

H. S.

BOOKS RECEIVED

The Man on Your Conscience. An investigation of the Evans Murder Trial. By MICHAEL EDDOWES. pp. 280. 1955. London: Cassell & Co., Ltd. 12s. 6d. net.

How to Study Insurance. With Special Reference to Examinations. By W. A. DINSDALE, Ph.D., B.Com., F.I.L., Director of Education, the Chartered Insurance Institute. pp. (with Index) 72. 1955. London: Sir Isaac Pitman & Sons, Ltd. 4s. 6d. net.

Matrimonial Property Law. University of Toronto School of Law Comparative Law Series, Volume 2. By W. FRIEDMANN, Professor of Law, University of Toronto. pp. iv and (with Index) 472. 1955. London: Stevens & Sons, Ltd. £3 3s. net.

De-rating and Rating Appeals, Volume 25—1954. Edited by F. A. AMIES, B.A., F.C.I.S., F.R.V.A., of Gray's Inn and the North Eastern Circuit, Barrister-at-Law. pp. viii and 415. 1955. London: The Solicitors' Law Stationery Society, Ltd. £2 2s. net.

American Constitutional Law. By B. SCHWARTZ, Professor of Law and Director of the Institute of Comparative Law, New York University, with a foreword by A. L. GOODHART, K.B.E., Q.C., Master of University College, Oxford. pp. xiv and (with Index) 364. 1955. Cambridge: Cambridge University Press. £1 5s. net.

The High Court of Chivalry. A verbatim report of the case of *The Lord Mayor, Aldermen and Citizens of Manchester* v. *The Manchester Palace of Varieties, Ltd.*, on 21st December, 1954. pp. 82. 1955. East Knoyle, Wiltshire: The Heraldry Society. 6s. net.

Three Great Systems of Jurisprudence. By K. KAHARA KAGAR, M.Litt. (Cantab.), Lecturer in Codes, Jews' College, London, with a foreword by H. G. HANBURY, D.C.L., Vinerian Professor of English Law in the University of Oxford. pp. xii and (with Index) 199. 1955. London: Stevens & Sons, Ltd. £1 5s. net.

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Additional Import Duties (No. 1) Order, 1955. (S.I. 1955 No. 1433.)

County of Inverness (Dores) Water Order, 1955. (S.I. 1955 No. 1429 (S. 130).) 5d.

County of Inverness (Allt Ribheir, Skye) Water Order, 1955. (S.I. 1955 No. 1430 (S. 131).) 5d.

Glasgow and Paisley Water Order, 1955. (S.I. 1955 (No. 1431 (S. 132).) 5d.

Hampson Green—North of Carnforth Special Road Scheme, 1955. (S.I. 1955 No. 1453.) 6d.

Lanarkshire Fire Area Administration Amendment Scheme Order, 1955. (S.I. 1955 No. 1428 (S. 129).)

London Traffic (Prescribed Routes) (City of London) (No. 5) Regulations, 1955. (S.I. 1955 No. 1446.)

London Traffic (Prescribed Routes) (East Ham) Regulations, 1955. (S.I. 1955 No. 1447.)

London Traffic (Prescribed Routes) (Hackney) (No. 2) Regulations, 1955. (S.I. 1955 No. 1448.)

Paper Bag Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1955. (S.I. 1955 No. 1458.) 5d.

Perambulator and Invalid Carriage Wages Council (Great Britain) Wages Regulation Order, 1955. (S.I. 1955 No. 1416.) 6d.

Retention of Cables, Mains and Pipes over and under Highways (Dorsetshire) (No. 1) Order, 1955. (S.I. 1955 No. 1422.)

Stopping up of Highways (Bedfordshire) (No. 4) Order, 1955. (S.I. 1955 No. 1439.)

Stopping up of Highways (Bristol) (No. 5) Order, 1955. (S.I. 1955 No. 1423.)

Stopping up of Highways (Buckinghamshire) (No. 4) Order, 1955. (S.I. 1955 No. 1444.)

Stopping up of Highways (Cheshire) (No. 5) Order, 1955. (S.I. 1955 No. 1414.)

Stopping up of Highways (County of Southampton) (No. 2) Order, 1955. (S.I. 1955 No. 1437.)

Stopping up of Highways (County Borough of Southampton) (No. 1) Order, 1955. (S.I. 1955 No. 1438.)

Stopping up of Highways (Essex) (No. 7) Order, 1955. (S.I. 1955 No. 1432.)

Stopping up of Highways (Glamorgan) (No. 2) Order, 1955. (S.I. 1955 No. 1426.)

Stopping up of Highways (Gloucestershire) (No. 8) Order, 1955. (S.I. 1955 No. 1421.)

Stopping up of Highways (Kent) (No. 16) Order, 1955. (S.I. 1955 No. 1440.)

Stopping up of Highways (Lancashire) (No. 7) Order, 1952 (Amendment) Order, 1955. (S.I. 1955 No. 1442.)

Stopping up of Highways (Leicestershire) (No. 3) Order, 1955. (S.I. 1955 No. 1434.)

Stopping of up Highways (Lincolnshire–Parts of Kesteven) (No. 1) Order, 1955. (S.I. 1955 No. 1418.)

Stopping up of Highways (Lincolnshire–Parts of Kesteven) (No. 2) Order, 1955. (S.I. 1955 No. 1443.)

Stopping up of Highways (London) (No. 35) Order, 1955. (S.I. 1955 No. 1417.)

Stopping up of Highways (London) (No. 39) Order, 1955. (S.I. 1955 No. 1419.)

Stopping up of Highways (London) (No. 40) Order, 1955. (S.I. 1955 No. 1415.)

Stopping up of Highways (London) (No. 42) Order, 1955. (S.I. 1955 No. 1441.)

Stopping up of Highways (Northumberland) (No. 1) Order, 1955. (S.I. 1955 No. 1413.)

Stopping up of Highways (Nottinghamshire) (No. 3) Order, 1955. (S.I. 1955 No. 1435.)

Stopping up of Highways (Staffordshire) (No. 4) Order, 1955. (S.I. 1955 No. 1425.)

Stopping up of Highways (West Riding of Yorkshire) (No. 5) Order, 1955. (S.I. 1955 No. 1436.)

Stopping up of Highways (Worcestershire) (No. 5) Order, 1955. (S.I. 1955 No. 1424.)

Superannuation (Transfers between the Civil Service and Public Boards) (Amendment No. 2) Rules, 1955. (S.I. 1955 No. 1427.)

Tuberculosis (Area Eradication) Amendment Order, 1955. (S.I. 1955 No. 1449.)

Tuberculosis (Argyll and Hebrides, Central, Forth and South-West Scotland Attested Area) Order, 1955. (S.I. 1955 No. 1445 (S. 133).)

Tuberculosis (North-West England Attested Area) Order, 1955. (S.I. 1955 No. 1451.)

Tuberculosis (South-West and Mid-Wales Attested Area) Order, 1955. (S.I. 1955 No. 1450.)

West Hampshire Water Order, 1955. (S.I. 1955 No. 1452.) 5d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, W.C.1. The price in each case, unless otherwise stated, is 4d. post free.]

POINTS IN PRACTICE

Town and Country Planning Act, 1954—Payment Where Land Disposed of by Gift—Gift by Joint Owners to One of Them

Q. We have been informed by the Central Land Board that in their opinion the disposal of an interest in land by way of a gift made by joint owners to one of their number does not constitute a gift for the purposes of s. 7 of the Town and Country Planning Act, 1954. We would be glad to have your comments on this opinion.

A. In our opinion, the Central Land Board are correct. Section 7 of the Town and Country Planning Act, 1954, requires that to qualify for a class C payment the claimant shall at the time of the disposition be beneficially entitled both to the claim holding and to the interest in land to which it relates. Presumably the claim holding in this case relates to the freehold interest, and, if the persons concerned were only joint owners with another, and therefore only partly interested beneficially, we do not think they can be said to be beneficially entitled to the freehold interest (or, indeed, to the claim holding).

Land Tax—Whether Redeemable out of Residue or Land Specifically Devised

Q. *A* by his will devised two freehold properties to his trustees upon trust for *B* during her life and after her death to *C* absolutely. No provision has been made in the will for payment of redemption money, but debts are to be payable out of residue. *A* has now died, and by reason of his death the land tax charged on the properties falls to be redeemed. According to the Finance Act, 1949, the personal representatives of *A* are liable for the redemption money. (*a*) Is the money payable out of the residue of the estate ? or (*b*) Is it a charge on the properties ?

A. We find this a very difficult question, upon which the text-books give no guidance at all. By the Finance Act, 1949, s. 40 (3), the redemption money is payable on such date (not earlier than the date of death) as may be prescribed. By the Land Tax (Redemption) Regulations, 1950 (S.I. 1950 No. 268), reg. 11, that date is one month after service of a notice by the registrar as therein mentioned. By the Finance Act, 1949, s. 40 (4), the redemption money is to constitute a class B land charge within the Land Charges Act, 1925. One is tempted to say that since the redemption money is, by s. 40 (4), charged upon the land the Administration of Estates Act, 1925, s. 35, applies and the money is payable out of the land specifically devised. But it is difficult to see how any sum can constitute a charge until it becomes payable and, as that is one month after notice, the property is not charged " at the time of his death " as mentioned in the Administration of Estates Act, 1925, s. 35, which can therefore have no application. Since it has no application, it is difficult to avoid the conclusion that the money is payable out of residue. One is left with the feeling that this is not a very equitable result, but, for the reasons given above, it is the only one which we have been able to reach. If the amount at issue is at all considerable, we think that the executors might do well to submit a short case to counsel on the footing that all the interested parties will agree to abide by his opinion.

Rent Restrictions—Possession Order Suspended on Payment of Arrears—Whether Future Arrears Included

Q. Our client, *A*, is the landlord of a rent-controlled house, and recently obtained a judgment against the tenant in the county court for possession within twenty-eight days, the order, however, being suspended providing the tenant paid the current rent and £1 per week off the arrears. We apprehend that the effect of this order will be that it will be completely discharged when the tenant has paid the arrears of rent outstanding at the date of the judgment and for which judgment was given, and will not be effective if, for example, the tenant having paid off such arrears then falls behind with his current rent. We wonder if you would kindly confirm this view. The tenant is a very bad tenant, and there is no doubt that he will fall in arrears in the future, and it would, of course, assist *A* considerably if advantage can be taken of the present judgment in the event of that happening.

A. In our opinion, the subsequent failure to pay rent would, in the case of such an order, entitle the landlord to proceed to execution (see *Yates* v. *Morris* [1951] 1 K.B. 77 (C.A.)) ; but this is subject to the possibility of a further order being made, discharging or rescinding the order for possession, under the Rent, etc., Restrictions Act, 1923, s. 4 (2). In view of *Haymills Houses, Ltd.* v. *Blake* [1955] 1 W.L.R. 237 (C.A.) (*ante*, p. 169), we consider that the tenant would be able to apply for such a further order even after the issue of a warrant for possession.

Option to Require New Lease—Rent Reserved by Original Lease in Excess of Standard Rent—Rent to be Reserved by New Lease

Q. A tenant takes a lease of a dwelling-house, the rateable value of which is within the Rent Restrictions Acts, the lease containing an option for the tenant to require the landlord to grant him a new lease for a further term at the end of the original term, such lease to be at the same rent and on the same terms as the original letting. It is conceded by the landlord that the rent reserved by the lease is considerably in excess of the standard rent, and the tenant has refused to pay more than the standard rent and has claimed back the excess which he has paid. Is the tenant entitled to the grant of a further lease in accordance with the terms of the option ? If so, it appears to us that the rent reserved by the lease should be the same in the new lease notwithstanding that it is in excess of the standard rent, as it is possible that there may be a modification of the Acts which would enable the landlord to claim the full rent.

A. In our view, nothing has happened to destroy or modify the tenant's right to a new lease ; but we agree that he should not be able to establish any claim to a modified reddendum. We base this opinion on the examination of the position by Slade, J., in *Schlisselman* v. *Rubin* (1951), 95 Sol. J. 745 : an agreement to pay more than the " permitted " amount of rent is in no way unlawful, though the tenant is entitled to recover the excess (within the two years' period : Rent Restrictions, etc., Act, 1923, s. 8 (2), and Increase of Rent, etc. (Restrictions) Act, 1938, s. 7 (6)).

Intestacy—Use of House and Furniture by Infant Beneficiaries Pending Distribution of Estate

Q. *A* died a widow leaving two children, both infants, one a daughter aged nineteen, who has married since her mother's death, and the other a son aged fourteen. The deceased's estate amounts to about £400, which includes furniture worth about £100 Administration is being taken out by the deceased's

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the " Points in Practice " Department, The Solicitors' Journal, 21 Red Lion Street, London, W.C.1.

They should be brief, typewritten in duplicate, and accompanied by the name and address of the sender on a separate sheet, together with a stamped addressed envelope. Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

sister and the husband of the married daughter. The married daughter and her husband are now living in the house formerly occupied by the deceased and using the furniture, and the deceased's son is living with them. Can the administrators safely allow this arrangement to continue until the estate becomes distributable, and if so on what terms? Alternatively could the administrators, at the request of the married daughter, invest part of her share in the estate in the purchase of the furniture at a valuation?

A. (1) The personal representatives may allow the furniture to be used as apparently it is now used (by the married daughter and the son) without being liable for loss (Administration of Estates Act, 1925, s. 47 (1) (iv)). We do not see that the use also by the husband need cause difficulty if the married daughter is regarded as joint user with the infant son. (2) We think this position could well continue after the married daughter attains twenty-one if she agrees. We do not think the representatives need fear any claim by the infant when he attains twenty-one as he is having in fact his proper share in the use of the furniture. On the other hand we prefer the solution mentioned in (3). (3) We think the alternative could properly be carried out (and might be simplest in practice) under the Administration of Estates Act, 1925, s. 41, with the consent of the married daughter when she attains twenty-one; there are difficulties while she is still an infant.

Highway—Right of Owners of Soil to Prevent Connections to Mains under Surface

Q. *A* has purchased building land fronting a road which the local authority confirms has long since by presumed dedication to the public and unrestricted user by the public become a highway repairable by the inhabitants at large. No right of way is included in the conveyance of the land to *A*. The original estate owners, who were not *A's* vendors, are now asking *A* to enter into a deed of covenant to contribute towards the maintenance and upkeep of the roadway and inform him that unless he does so they will not permit him to break into the road in connection with any building operations he may carry out upon the land nor will they permit him to connect any buildings he may erect on the various plots of land fronting the road to the public sewer or mains supplies of gas, water and electricity laid under the surface of such road. Where a highway originally private such as the road in question has become a public highway, what right remains vested in the estate owners enabling them to prevent *A* from connecting his houses to the usual mains services? Have not the local authority and the gas, water and electricity undertakings statutory powers and obligations enabling them to override any such rights in making the required connections? If so can you kindly indicate what these are?

A. (1) In the first place we would suggest that it might be argued (possibly with confidence—we do not know the facts sufficiently well to judge) that the soil in half the road passed to *A* so far as co-extensive with his land. Compare Emmet on Title, 14th ed., vol. I, p. 447. If this is so he may be able to make connections as owner of the soil of half the road. (2) Dedication of land as a highway gives the public certain rights of passage: otherwise the ownership of the soil remains in the owners and they can prevent trespass to it. Most of the statutory powers give public authorities rights to lay *their* pipes, mains, etc., under highways. However, (i) the Public Health Act, 1936, s. 34 (1) and (2), appear to give the owner of the land the right, by the specified procedure, to connect to the public sewer. (ii) If (as is likely and can be no doubt confirmed) the Water Act, 1945, applies in the area then Sched. III, para. 21, gives the undertakers the right to lay service pipes in any "street" (which includes any highway: *ibid.*, Sched. III, para. 1 (1)). (iii) The position of the Electricity Board may be doubtful. See note in Halsbury's Statutes, 2nd ed., vol. 8, p. 853, to Electric Lighting Clauses Act, 1899, Sched., para. 12. However, if there is a main in the highway probably the Board would take the view that they may break the soil to connect a house to it. (iv) The Area Gas Board have powers under the Gas Act, 1948, Sched. III, para. 1, which appear adequate; the word "street" includes a highway (*ibid.*, Sched. III, para. 46). It will be appreciated that these statutory powers are most complex. The above summary indicates the principal relevant provisions but is not claimed to be exhaustive.

NOTES AND NEWS

Honours and Appointments

Mr. R. W. Horsfall, Deputy Town Clerk, Todmorden, has been appointed Clerk and Solicitor, Hale Urban District Council.

The Board of Trade has appointed Sir Thomas Robson, M.B.E., as Chairman and Mr. C. I. R. Hutton, The Rt. Hon. Lord Latham and Mr. W. H. Lawson, C.B.E., as members of the Companies Act Accountancy Advisory Committee. These appointments have been made following the resignations of Sir Russell Kettle (Chairman) (on his retirement from practice) and Mr. F. G. Wiseman, and the death of Mr. J. C. Burleigh.

Mr. R. S. Bacon, Chief Justice, Gibraltar, has been appointed Justice of Appeal, East African Court of Appeal.

Mr. I. R. Greene, Senior Resident Magistrate, Zanzibar, has been appointed Judge of the High Court, Somaliland Protectorate.

Personal Notes

Mr. H. C. F. M. Fillmore, who has been Town Clerk of Warwick for the past twenty-three years, will be retiring in October on medical advice.

Mr. I. E. Russell, solicitor, of March, was married on 10th September to Miss J. Sanderson, of March.

Mr. N. W. Watts, solicitor, of Earl Shilton, Leicestershire, was married on 15th September to Miss A. K. Blanire, of Blackford.

Wills and Bequests

Mr. Alexander Wilkins, solicitor, of Bradford-on-Avon, left £12,461 (£12,218 net).

OBITUARY

Mr. M. H. THORP

Mr. Markham Henry Thorp, solicitor, of Ludgate Hill, London, E.C.4, died on 15th September at Alassio. He was admitted in 1920.

SOCIETIES

A course on Industrial and Factory Law under the auspices of the Industrial Welfare Society (Inc.) will be held at Robert Hyde House, 48 Bryanston Square, London, W.1, on 25th–27th October, 1955 (tutor: Mr. Harry Samuels, M.A., barrister-at-law). The course covers in a short period of three days the whole of the legal groundwork necessary to industrial managers and executives.

CORRESPONDENCE

[*The views expressed by our correspondents are not necessarily those of* The Solicitors' Journal]

Capital Punishment

Sir,—An increasing number of lawyers feel that the use of death as a punishment ought not to be continued by a civilised community.

I should be grateful if you would allow me to say that a National Campaign for the Abolition of Capital Punishment has been launched and to ask those solicitors who share this view to send to the Secretary, Mrs. Duff, 14 Henrietta Street, W.C.2, a postcard with the word "Abolitionist," their name and address.

London, S.W.1. Robert S. W. Pollard.

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